

On November 19, 2021, the Court ordered that the parties (Plaintiff, Bryndon Fisher, and Defendant, the United States) meet and confer over their disagreement as to the contents of two expert reports plaintiff had submitted with his reply brief in support of his motion for class certification. ECF No. 115. In that order, based on the parties' agreement, the Court adopted the following meet and confer schedule:

- Id.* The Court also ordered that the parties “file a joint status report . . . stating whether the concerns have been resolved and whether further briefing is necessary.” ECF No. 115; *see* ECF No. 116 (extending deadline to January 26, 2022). And “[i]f further briefing is necessary,” the Court instructed the “parties [to] identify the outstanding concerns and propose the nature and schedule for further briefing.” ECF No. 115.

The parties have agreed to further briefing. Consistent with this Court's order, Defendant submitted to Plaintiff "a complete list of its concerns with Plaintiff's expert reports contained in

Plaintiff's reply brief" by the date specified in the Court's order. Thereafter, Plaintiff timely responded to "each of Defendant's concerns." The parties further met and conferred via telephone on January 21, 2022. Despite these efforts, the parties report that they have been unable to resolve their disagreements.

The central thrust of the disagreements arise out of the parties' differing, and apparently irreconcilable, views regarding what case law and procedural rules allow when supplemental reports are submitted with a reply brief. Plaintiff views these reports as doing no more than rebutting the Government's experts' rebuttal reports, which were submitted with its response brief. Defendant views these reports as an attempt on reply to correct noted deficiencies in plaintiff's case in chief, through new and changed opinions. The parties identify the disputed segments of these reports in the attachment to this joint status report. *See* Exhibits A & B (under seal).

Having been unable to resolve their disputes as it relates these identified portions of plaintiffs' reports, the parties propose limited further briefing to resolve the issue. After conferring on the nature and schedule of that briefing, the parties jointly propose that each side submit a 10-page brief discussing their respective legal positions on the proper scope of what can or cannot be included in a supplemental expert report submitted with a reply brief, specifically as it relates to plaintiff's experts' reports. These supplemental briefs will be limited to addressing this narrow legal question (and its application to the identified portions of plaintiff's expert rebuttal reports here). *See* Exs. A & B. For now, the parties' supplemental briefs would not address the merits of the expert opinions contained in plaintiff's rebuttal reports.

Accordingly, the parties propose that their supplemental briefs be contemporaneously filed with the Court on or before February 25, 2022.<sup>1</sup>

---

<sup>1</sup> Government counsel requests that the Court order briefing on February 25, 2022 because over the next three weeks, he must devote time to (1) prepare for and attend regular

Respectfully submitted,

Counsels for Defendant,  
THE UNITED STATES

BRIAN M. BOYNTON  
Assistant Attorney General

PATRICIA M. McCARTHY  
Director

/s/ Steven J. Gillingham  
STEVEN J. GILLINGHAM  
Assistant Director

/s/ Meen Geu Oh  
MEEN GEU OH  
Senior Trial Counsel  
Department of Justice  
P.O. Box 480  
Ben Franklin Station  
Washington, DC 20005  
Tel: (202) 307-0184  
Email: Meen-Geu.Oh@usdoj.gov

Counsels for Plaintiff  
BRYNDON FISHER

**SCHUBERT JONCKHEER & KOLBE LLP**

By: /s/ Noah M. Schubert  
Noah M. Schubert

Noah M. Schubert  
Attorney of Record  
*nschubert@sjk.law*  
Three Embarcadero Ctr Ste 1650  
San Francisco, CA 94111-4018  
Ph: 415.788.4220  
Fx: 415.788.0161

Of Counsel:  
Robert C. Schubert  
*rschubert@sjk.law*  
Miranda P. Kolbe  
*mkolbe@sjk.law*  
**Schubert Jonckheer & Kolbe LLP**  
Three Embarcadero Ctr Ste 1650  
San Francisco, CA 94111-4018  
Ph: 415.788.4220  
Fx: 415.788.0161

---

mediation conferences in a trade matter; (2) prepare for an appellate argument in the United States Court of Appeals for the Federal Circuit, scheduled for February 9, 2022, and (3) draft an appellate response brief in a separate matter in the same court, which is due by February 18, 2022.

CONFIDENTIAL  
ATTACHMENTS FILED  
UNDER SEAL